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*and M. Sayre*  
9

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

14 MICHAEL ROMERO,

15 Plaintiff,

16 v.  
17

18 S. ELLERY, et al.,

19 Defendants.

C 12-1084 WHO (PR)

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION FOR A STAY OF  
DISCOVERY AND OPPOSITION TO  
PLAINTIFF'S MOTION FOR LEAVE TO  
FILE ADDITIONAL  
INTERROGATORIES**

21 TO PLAINTIFF, MICHAEL ROMERO, PRO SE:

22 PLEASE TAKE NOTICE that Defendants Cate, Creed, Ellery, Grenert, Harman, Lewis,  
23 Ohland, Tupy, Wood, and Sayre (Defendants) move this Court for a protective order to stay  
24 discovery, including, but not limited to, requests for admissions, interrogatories, and document  
25 production, under Federal Rule of Civil Procedure 26(c) on the grounds that Defendants filed a  
26 motion to dismiss, asserting qualified immunity. This motion is based on this notice of motion  
27 and motion, the accompanying memorandum of points and authorities, all pleadings, exhibits, and  
28 papers on file in this action, and any other matters properly before the Court.

1 In addition, Defendants oppose Plaintiff's motion for leave to file additional interrogatories.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **STATEMENT OF CASE**

4 Plaintiff Michael Romero (Romero), a state prisoner at Pelican Bay State Prison (Pelican  
 5 Bay), filed a civil rights action under 42 U.S.C. § 1983. (Am. Compl., ECF No. 7) Romero  
 6 alleges that on April 23, 2011, Defendants Ellery, Harman, and Grenert violated the Eighth  
 7 Amendment excessive force prohibition by unnecessarily spraying him with pepper spray during  
 8 a cell search. (*Id.* 7, ¶¶ 12-15.) Romero further alleges that Defendant Creed, a licensed  
 9 vocational nurse, deliberately denied medical treatment for the effects of the pepper spray,  
 10 released Romero back to his cell before the cell was decontaminated, and never conducted a  
 11 follow-up medical examination. (*Id.* 8, ¶¶ 27-31.) In addition, Romero claims that the  
 12 supervisory defendants breached their duties to legally administer the prison, and train and  
 13 supervise subordinates, resulting in a violation of his rights. (*Id.* 19, ¶¶ 73-74.) He also alleges  
 14 that Defendants Lewis and Cate failed to properly investigate and discipline the prison staff for  
 15 their use of excessive force. (*Id.* 11-12, ¶ 38.) Finally, Romero asserts that Defendants Tupy and  
 16 Wood found him guilty of willfully resisting a peace officer in violation of his due-process rights  
 17 despite the lack of evidence. (*Id.* 18, ¶¶ 68.)

18 On September 25, 2013, Defendants filed a motion to dismiss arguing that Romero's  
 19 excessive force, failure to supervise, train, investigate, discipline, and due-process claims are  
 20 barred by the *Heck v. Humphrey* favorable termination rule, Romero did not exhaust  
 21 administrative remedies for the failure to supervise, train, investigate, discipline, due-process  
 22 violations, and medical deliberate indifference claims, and Romero failed to state cognizable  
 23 supervisory liability claims. (Defs.' Not. Mot. & Mot. Dismiss; Mem. P. & A. (Defs.' Mot.  
 24 Dismiss), ECF No. 42.) On October 30, 2013, Romero filed an opposition to Defendants' motion  
 25 to dismiss. (Pl.'s Opp'n Defs.' Mot. Dismiss (Pl.'s Opp'n), ECF No. 48.) In the opposition,  
 26 Romero moved to voluntarily dismiss the failure to train, failure to supervise, failure to  
 27 investigate, due process, and deliberate indifference to medical needs claims. (Pl.'s Opp'n 12-13.)  
 28 Romero also released Defendants Cate, Lewis, Tupy, Ohland, Wood, Sayre, and Creed from all

1 liability in this case. (*Id.*) The only claim that Romero continues to pursue is the excessive force  
 2 claim against Defendants Ellery, Harman, and Grenert. (*Id.* 2:1-3.) On November 14, 2013,  
 3 Defendants filed a reply to Romero's opposition to Defendants' motion to dismiss. (Defs.' Reply  
 4 Pl.'s Opp'n Defs.' Mot. Dismiss; ECF No. 49.) On December 9, 2013, Plaintiff filed a motion for  
 5 leave to file additional interrogatories. (Pl.'s Mot. Leave File Additional Interrogs., ECF No. 50.)  
 6 Defendants now request an order staying discovery until the motion to dismiss is decided and  
 7 oppose Plaintiff's motion for leave to file additional interrogatories.

## 8 ARGUMENT

### 9 I. DISCOVERY SHOULD BE STAYED PENDING A DECISION ON DEFENDANTS' MOTION 10 TO DISMISS BASED ON THE THRESHOLD QUESTION OF QUALIFIED IMMUNITY.

11 The Supreme Court has made it clear that a district court should stay discovery until the  
 12 threshold question of qualified immunity is settled. *Crawford-El v. Britton*, 523 U.S. 574, 598  
 13 (1998) ("If the defendant does plead the immunity defense, the district court should resolve that  
 14 threshold question before permitting discovery"); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6  
 15 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson*, the Court reiterated that  
 16 "[o]ne of the purposes of the *Harlow* qualified immunity standard is to protect public officials  
 17 from the broad-ranging discovery that can be peculiarly disruptive of effective government."  
 18 *Anderson*, 483 U.S. at 646 n.6 (internal quotation marks omitted). In the prison context, the  
 19 doctrine of qualified immunity allows officials to maintain order and safety without the fear of  
 20 liability for doing what seemed reasonable at the time. *See Jeffers v. Gomez*, 267 F.3d 895, 917-  
 21 18 (9th Cir. 2001).

22 "A trial court has broad discretion and inherent power to stay discovery until preliminary  
 23 questions that may dispose of the case are determined." *Petrus v. Bowen*, 833 F.2d 581, 583 (5th  
 24 Cir. 1987); *see also Defensive Instruments, Inc. v. R.C.A. Corp.*, 385 F. Supp. 1053, 1054 (W.D.  
 25 Pa. 1974). According to the Ninth Circuit, a stay of discovery until the threshold question of  
 26 qualified immunity is settled "furthers the goal of efficiency for the court and litigants." *Little v.*  
 27 *City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). "The district court has wide discretion in

28

1 controlling discovery. Such rulings will not be overturned unless there is a clear abuse of  
 2 discretion.” *Id.*

3 On April 2, 2013, Romero served Defendants Ellery, Harman, Grenert, Tupy, Ohland,  
 4 Wood, Lewis, Cate, Sayre, and Creed with a first set of common interrogatories. (Decl. Duncan  
 5 Supp. Defs.’ Mot. Stay Discovery (Decl. Duncan) ¶ 2, Ex. A.) Romero sought responses from  
 6 each of the Defendants separately, fully, in writing, and under oath. (*Id.* ¶ 2, Ex. A, 1:27-28.) On  
 7 July 5, 2013, after obtaining an extension of time, Defendants Ellery, Harman, Grenert, Tupy,  
 8 Ohland, Wood, Sayre, and Creed each served timely responses to Romero’s interrogatories. (*Id.*  
 9 ¶¶ 3-10, Exs. B-I.) On August 19, 2013, after obtaining an additional extension of time,  
 10 Defendant Lewis served timely responses to Romero’s interrogatories. (*Id.* ¶ 11, Ex. J.) On  
 11 September 17, 2013, after obtaining an additional extension of time, Defendant Cate served  
 12 timely responses to Romero’s interrogatories. (*Id.* ¶ 12, Ex. K.)

13 To require Defendants to provide any further discovery responses would defeat the  
 14 important basis of the qualified immunity standard. A stay in discovery would allow for the issue  
 15 of qualified immunity to be disposed of before Defendants are required to engage in further  
 16 expensive and time-consuming discovery, including discovery motions. Defendants filed the  
 17 motion to dismiss because Romero’s excessive force claim is barred by the *Heck v. Humphrey*  
 18 favorable termination rule and Defendants requested a ruling on qualified immunity. A stay of  
 19 discovery would allow this motion to be considered before the parties and this Court are burdened  
 20 with spending further resources on this case.

21 Discovery may be limited where: (i) the discovery sought is unreasonably cumulative or  
 22 duplicative, or can be obtained from some other source that is more convenient, less burdensome,  
 23 or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the  
 24 information by discovery in the action; or (iii) the burden of the proposed discovery outweighs its  
 25 likely benefits, taking into account such factors as the needs of the case, the parties’ resources,  
 26 and the importance of the issues at stake, and the role of the proposed discovery in resolving  
 27 those issues. Fed. R. Civ. P. 26(b)(2)(C); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st  
 28

1 Cir. 1998). In the case at hand, Romero's discovery requests run afoul of one or more of the  
 2 recognized justifications for limiting discovery.

3 Romero has had ample opportunity to obtain discovery since the Court screened Romero's  
 4 amended complaint and opened discovery on January 17, 2013. (Order of Service 8 ¶ 5.) On  
 5 April 2, 2013, Romero served Defendants Ellery, Harman, Grenert, Tupy, Ohland, Wood, Lewis,  
 6 Cate, Sayre, and Creed with a first set of common interrogatories. (Decl. Duncan, ¶ 2, Ex. A.)  
 7 Romero's interrogatories thoroughly inquired as to the Defendants' involvement, thoughts, and  
 8 recollections of the April 23, 2011 cell search that resulted in the use of pepper spray. (*Id.*) And  
 9 Defendants' responses reflect a complete and substantive discussion of the reasons for the use of  
 10 force on that day. (*Id.* ¶¶ 3-12, Exhs. B-K.) Romero failed to serve further discovery before the  
 11 Defendants asserted qualified immunity in their motion to dismiss on September 25, 2013.

12 On December 19, 2013, the parties discussed Defendants' request for a discovery stay  
 13 pending the Court ruling on Defendant's motion to dismiss. (Decl. Duncan ¶ 2.) Romero refused  
 14 to stipulate and the parties were unable to reach an agreement. (*Id.*)

15 **II. DEFENDANTS' OPPOSE PLAINTIFF'S MOTION FOR LEAVE TO FILE ADDITIONAL  
 16 INTERROGATORIES.**

17 On December 9, 2013, Romero filed a motion for leave to file additional interrogatories.  
 18 (Pl.'s Mot. Leave File Additional Interrogs., ECF No. 50.) Defendants oppose Romero's motion  
 19 for leave to file additional interrogatories and contend that Romero's motion fails to comply with  
 20 the Northern District of California's local rules regarding motions to exceed the Fed. R. Civ. P.  
 21 33 twenty-five interrogatory limit. A motion for leave to propound more interrogatories must  
 22 include a memorandum which sets forth each proposed additional interrogatory and explains in  
 23 detail why it is necessary to propound additional questions. Civil L.R. 33-3. Romero's motion  
 24 does not include such a memorandum or a description of the additional interrogatories that  
 25 Romero seeks to propound. Defendants contend that additional discovery is unnecessary and  
 26 burdensome and Romero failed to show why additional interrogatories beyond the twenty-eight  
 27 interrogatories that were served and answered by the ten Defendants are needed.

28

## CONCLUSION

Defendants respectfully requests that the Court grant this motion to stay discovery, including, but not limited to, requests for admissions, interrogatories, document production, and discovery motions, until the Court rules on Defendants' motion to dismiss on the threshold question of qualified immunity. In addition, Defendants request that the Court deny Romero motion for leave to file additional interrogatories.

Dated: December 23, 2013

Respectfully submitted,

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DANIELLE F. O'BANNON  
Supervising Deputy Attorney General

*/s/ D. Robert Duncan*  
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Deputy Attorney General  
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Wood, and M. Sayre*

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## CERTIFICATE OF SERVICE

Case Name: Romero v. Ellery, et al. No. C 12-1084 RS

I hereby certify that on December 23, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR A STAY OF DISCOVERY  
AND OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE ADDITIONAL  
INTERROGATORIES**

**DECLARATION OF R. DUNCAN IN SUPPORT OF DEFENDANTS'  
MOTION TO STAY DISCOVERY**

**[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR STAY OF  
DISCOVERY PENDING RULING ON DEFENDANTS' MOTION TO DISMISS**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On December 23, 2013, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

**Michael Romero  
(K-29169)  
Pelican Bay State Prison  
P.O. Box 7500  
Crescent City, CA 95532  
Pro Se**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 23, 2013, at San Francisco, California.

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L. Santos  
Declarant

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/s/ L. Santos  
Signature